United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1904.

No. 1390.

FRANK H. KNIGHT, APPELLANT,

vs.

W. T. WALKER BRICK COMPANY, A CORPORATION DULY INCORPORATED UNDER THE LAWS OF THE STATE OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 21, 1904.

In the Court of Appeals of the District of Columbia

FRANK H. KNIGHT, Appellant,
vs.
W. T. WALKER BRICK COMPANY, a Corporation. } No. 1390.

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a Supreme Court of the District of Columbia.

W. T. WALKER BRICK COMPANY, a Corporation Duly Incorporated under the Laws of the State of Virginia, Plaintiff,
vs.
FRANK H. KNIGHT, Defendant. } No. 46175. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration.*

Filed April 23, 1903.

In the Supreme Court of the District of Columbia.

W. T. WALKER BRICK COMPANY, a Corporation Duly Incorporated under the Laws of the State of Virginia, Plaintiff,
vs.
FRANK H. KNIGHT, Defendant. } Law. No. 46175.

1. The plaintiff, The W. T. Walker Brick Company, a corporation duly incorporated under the incorporation laws of the State of Virginia, sues the defendant Frank H. Knight for that the said defendant on, to wit, the 13th day of December, 1902, by his promissory note, signed by his name of F. H. Knight, now overdue, promised to pay to the plaintiff, by its corporate name of W. T. Walker Brick Co., at Citizens national bank, Washington, D. C., $840.00, three months after date, with interest at 6% per annum until paid, but

did not pay the same. And the plaintiff claims of the said defendant the sum of $840.00 with interest thereon at 6% per annum from December 13th, 1902.

2. The plaintiff, The W. T. Walker Brick Company, sues the defendant Frank H. Knight for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between
2 them. And the plaintiff claims $840.00 with interest from the 13th day of December, 1902, according to the particulars of demand hereto annexed besides costs.

BATES WARREN,
Att'y for Pl't'ff.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

BATES WARREN.
Att'y for Pl't'ff.

3 *Particulars of Demand.*

Filed April 23, 1903.

F. H. Knight, Dr., to W. T. Walker Brick Co.

To amount of following note, and interest..... $840.00

(*Copy of Note.*)

$840.00. WASHINGTON, D. C., *Dec.* 13, 1902.

Three months after date I promise to pay to the order of W. T. Walker Brick Co., eight hundred and forty dollars, at Citizens national bank.

Value received with interest at six per cent. per annum until paid.

No. —. Due ——.

(Signed) F. H. KNIGHT,
1505 *T St., N. W.*

(On margin:) W. T. Walker & Co., brick manufacturers, offices: 8 and 9 Corcoran building, Washington, D. C.

4 *Affidavit.*

Filed April 23, 1903.

DISTRICT OF COLUMBIA, *ss:*

Charles J. Walker, being first duly sworn, on oath says that he is the treasurer of The W. T. Walker Brick Company, the party named as plaintiff in the foregoing and annexed declaration, wherein Frank H. Knight is named as defendant; that the plaintiff, The W. T. Walker Brick Company is a corporation duly incorporated under the laws of the State of Virginia, and brings this suit against the said defendant on account of the nonpayment by the defendant of the promissory note set out and described in the first count of the declaration hereto attached; that the said note as set out in the said first count of the said declaration was actually made, executed, and delivered by the said Frank H. Knight to the order of the said plaintiff corporation on account of goods and merchandise actually sold and delivered by the said plaintiff to the said defendant at his request; that the said note was duly presented for payment at maturity, but was not paid; that the said defendant has not paid the said note, nor any part thereof, although thereunto frequently requested; that there is now justly due and owing from the defendant to the said plaintiff, by reason of the premises, the sum in the declaration claimed, namely, $840.00, with interest thereon at 6 % per annum from December 13th, 1902, exclusive of all set offs and other just grounds of defense, besides the costs of this suit.

CHAS. J. WALKER, *Treas.*

5 Subscribed and sworn to before me this 20th day of April, A. D. 1903.

W. MOSBY WILLIAMS,
Notary Public, D. C.

[SEAL.]

Note Sued On.

Filed June 11, 1903.

12.60 int.
$840.00. WASHINGTON, D. C., *December* 13, 1902.

Three months after date I promise to pay to the order of W. T. Walker Brick Co., eight hundred and forty $\frac{}{100}$ dollars at Citizens national bank.

Value received with interest at six per cent. per annum until paid.

No. —. Due ——.

F. H. KNIGHT,
1505 *T St. N. W.*

(On margin:) W. T. Walker & Co., brick manufacturers, offices: 8 and 9 Corcoran building, Washington, D. C.

Endorsed: 56882. F. H. Knight 840. M'ch 13. 12.60 int. W. T. Walker Brick Co., by Chas. J. Walker, treas.

6 *Pleas and Affidavit.*

Filed May 15, 1903.

In the Supreme Court of the District of Columbia.

W. T. WALKER BRICK CO., a Corporation,
vs.
FRANK H. KNIGHT. } At Law. No. 46175.

The defendant, Frank H. Knight, for plea to the plaintiff's declaration filed herein says:

First. He did not promise as alleged.

Second. He is not indebted as alleged.

HAYDEN JOHNSON,
Attorney for Defendant.

DISTRICT OF COLUMBIA, *ss:*

Frank H. Knight, being first duly sworn, deposes and says that he is the party named as defendant in the above entitled cause wherein, The W. T. Walker Brick Co., is named as plaintiff. He denies the right of the plaintiff to recover the amount claimed in said declaration. That the facts and circumstances out of which the alleged indebtedness grew are as follows: During the month of August 1896 affiant by reason of certain building ventures he had undertaken became indebted to numerous persons in various amounts among others being W. T. Walker and Co., the predecessor of the plaintiff. That to satisfy the demands of his creditors affiant during the said month of August executed for their benefit a deed of assignment to Jessie L. Haskell,
7 Thomas L. Landon and William T. Walker, the last named assignee being a member of the firm of W. T. Walker and Co. and whose claim against affiant amounted to $800.00. That after the execution of said assignment affiant entered into a written agreement with William T. Walker on behalf of his firm whereby it was agreed that affiant should convey to Walker lot 80 in square 190 subject to a trust of $1800. in consideration for which the said Walker agreed to cancel and release to affiant the aforesaid indebtedness and pay him $400. in cash. That thereafter the said Walker wishing to recede from said contract the following agreement was substituted. In consideration of affiant's releasing the said Walker from his obligation to take said lot and perform the other conditions of the aforesaid contract Walker agreed to accept affiant's note for the amount of the said claim with accrued interest which amounted to $840.00 upon the understanding that there should be credited thereupon whatever amount the said Walker might be-

come entitled to out of the estate conveyed by said assignment, on account of his office as assignee. That the commission reserved to said assignee was 7½ % upon the amount reserved from the sale of the property conveyed by the assignment and the amount allowed them by the auditor of this court upon a recent bill to administer the trust was $1238.97. That one-third of this amount of $412.99 is the amount of said commission reserved to the said Walker as assignee and which said amount pursuant to the terms of this said agreement should be credited on account of said note but which the said Walker has not done. That the business of the said William T. Walker having in the meantime been incorporated affiant was requested as a matter of convenience to make said note payable to the order of the said corporation which was done subject to
8 the understanding hereinbefore recited.

FRANK H. KNIGHT.

Subscribed and sworn to before me this 15th day of May, 1903.

J. R. YOUNG, *Clerk*,
By W. E. WILLIAMS, *Ass't Clerk.*

Amended Affidavit of Defense.

Filed June 22, 1903.

In the Supreme Court of the District of Columbia.

W. T. WALKER BRICK Co. (a Corporation)
vs.
FRANK H. KNIGHT. } At Law. No. 46175.

DISTRICT OF COLUMBIA, *ss:*

Frank H. Knight being first duly sworn deposes and says, that he is the party named as defendant in the above entitled cause wherein The W. T. Walker Brick Co., is named as plaintiff. He denies the right of the plaintiff to recover the amount claimed in said declaration. He denies that the note declared upon in the declaration filed in said cause was given for goods and merchandise sold and delivered by the plaintiff to affiant or that affiant ever purchased any goods or merchandise from the said plaintiff. That the facts and circumstances out of which the alleged indebtedness grew and which resulted in the execution by affiant of the note sued upon are as follows:—

9 On the seventeenth day of August 1896, affiant, by reason of certain unsuccessful business ventures he had undertaken, was indebted to numerous persons in various sums, among others being the firm William T. Walker and Co. the predecessor of the plaintiff corporation and whose claim against affiant amounted to

$800.00. That to satisfy the demands of his said creditors, affiant on said seventeenth day of August 1896, executed for their benefit a deed of assignment to Jesse L. Heiskell, Thomas E. Lander and William T. Walker, as assignees, the last named assignee being a member of the aforesaid firm of William T. Walker and Co., That shortly after the execution of said deed of assignment affiant entered into a written contract with the said William T. Walker, member of the firm of William T. Walker and Co., as aforesaid acting on behalf of said firm and with its authority, whereby it was agreed that affiant should convey to the said firm lot 80, in square 190, subject to a trust of $1800. in consideration for which conveyance the said firm was to cancel and release to affiant the aforesaid indebtedness and also pay him the sum of $400 in cash. That thereafter the said firm wishing to recede from the said contract the following agreement was substituted between them. In consideration of affiant's releasing the said firm from their obligation to take said lot and perform the other conditions of the aforesaid contract the said firm, acting through its duly authorized representative the said William T. Walker agreed to credit on the indebtedness due the said firm from affiant, an amount equal to the amount that should subsequently be allowed to the said William T. Walker as commission as assignee in the aforesaid assignment. That the said commission not being ascertainable at that time it was understood that affiant should execute his note as a memoranda of the amount of his original indebtedness and interest due up to that time which amounted to $840.00 with the collateral understanding and condition that when the amount due the said William T. Walker should be ascertainable it should be credited upon said memoranda and the said paper should then be considered a promissory note in favor of the said firm for the balance. That the said firm of William T. Walker and Co., before the execution of said note having been in-co-perated as the W. T. Walker Co. affiant was requested by the said William T. Walker who was the treasurer and the lawfully authorized agent of the said corporation, to make said note as a matter of convenience to the said corporation, the successor as aforesaid of William T. Walker and Co., which was done by affiant subject to the aforesaid understanding and conditions. That the commission reserved to said assignees in the said deed of assignment was 7½ % upon the amounts received by them from the sale of the property conveyed by the said deed; and the amount allowed them by the auditor of this court in equity cause No. 23,417 being a suit to administer said trust was $1238.97. That one-third of this amount or the sum of $412.99 is the amount of commission reserved to the said Walker as assignee and that this amount pursuant to the terms of the said agreement should be credited on account of the said note, but which the said plaintiff has not done.

FRANK H. KNIGHT.

Subscribed and sworn to before me this 22 day of June, 1903.
J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN, *Ass't Cl'k.*

11 *Motion for Judgment, &c.*

Filed July 7, 1903.

In the Supreme Court of the District of Columbia.

W. T. WALKER BRICK Co., Plaintiff,
vs.
FRANK KNIGHT, Defendant. } At Law. No. 46175.

Now comes the plaintiff and moves the court for judgment against the defendant in the above-entitled cause for the want of a sufficient affidavit of defense to his pleas as provided under the seventy-third rule of this court.

BATES WARREN.
W. H. SHOLES.

Hayden Johnson, Esq., attorney for defendant.

DEAR SIR: Take notice that on Wednesday next, July 8th, 1903, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, the above motion will be called to the attention of the justice holding circuit court No. 1.

BATES WARREN.
W. H. SHOLES.

12 Supreme Court of the District of Columbia.

FRIDAY, *October* 30, 1903.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

W. T. WALKER BRICK COMPANY, a Corporation, Plaintiff,
vs.
FRANK H. KNIGHT, Defendant. } At Law. No. 46175.

Upon hearing the motion for judgment against the defendant for want of a sufficient affidavit of defense, it is considered that said motion be, and hereby is granted; therefore it is considered that the plaintiff recover against the defendant the sum of eight hundred and forty dollars ($840.) with interest thereon from the 13th day of December, 1902 at 6% per annum until paid, being the money payable by said defendant to the plaintiff by reason of the premises,

together with its costs of suit to be taxed by the clerk, and have execution thereof.

The defendant notes an appeal to the Court of Appeals, and the penalty of the bond on said appeal is fixed at fifty dollars.

Memorandum.

November 23, 1903.—Appeal bond filed.

13 *Order for Preparation of Record on Appeal.*

Filed December 18, 1903.

In the Supreme Court of the District of Columbia.

W. T. WALKER BRICK CO.
vs.
FRANK H. KNIGHT. } Law. No. 46175.

The clerk of said court will please prepare the record for appeal in the above entitled cause which record shall contain the following papers:

Declaration and affidavit of plaintiff;
Pleas and amended affidavit of defense of defendant;
Motion for judgment of plaintiff and entry of judgment.

HAYDEN JOHNSON,
Attorney for Defendant.

14 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 13, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 46,175, at law, wherein The W. T. Walker Brick Company, a corporation, duly incorporated under the laws of the State of Virginia, is plaintiff, and Frank H. Knight is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 7th day of January, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1390. Frank H. Knight, appellant, *vs.* W. T. Walker Brick Company, a corporation. Court of Appeals, District of Columbia. Filed Jan. 8, 1904. Henry W. Hodges, clerk.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1904.

No. 1390.

FRANK H. KNIGHT, APPELLANT,

vs.

W. T. WALKER BRICK COMPANY, A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

HAYDEN JOHNSON,
For Appellant.

THE LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1904.

No. 1390.

FRANK H. KNIGHT, APPELLANT,

vs.

W. T. WALKER BRICK COMPANY, A CORPORATION, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

Statement of Case.

This is an appeal from an order of the court below granting the plaintiff's motion for judgment under the seventy-third rule of that court, for want of a sufficient affidavit of defense.

The action is one of assumpsit upon a promissory note for $840, executed by the defendant to the order of the plaintiff. The declaration contains the usual special count and the common counts. The pleas are *non assumpsit* and *nil debit*. The affidavit of defense traverses the allegations of the plaintiff's affidavit and sets up a different statement of facts.

The question presented by this appeal is the sufficiency in law of the defense thus set up, and the error assigned by

the appellant as committed by the trial court is in holding such defense insufficient.

The defendant's affidavit is as follows:

DISTRICT OF COLUMBIA, *ss:*

Frank H. Knight, being first duly sworn, deposes and says that he is the party named as defendant in the above-entitled cause, wherein the W. T. Walker Brick Company is named as plaintiff. He denies the right of the plaintiff to recover the amount claimed in said declaration. He denies that the note declared upon in the declaration filed in said cause was given for goods and merchandise sold and delivered by the plaintiff to affiant, or that affiant ever purchased any goods or merchandise from the said plaintiff. That the facts and circumstances out of which the alleged indebtedness grew and which resulted in the execution by affiant of the notes sued upon are as follows:

On the 17th day of August, 1896, affiant, by reason of certain unsuccessful business ventures he had undertaken, was indebted to numerous persons in various sums, among others being the firm of William T. Walker & Co., the predecessor of the plaintiff corporation, and whose claim against affiant amounted to $800. That to satisfy the demands of his said creditors, affiant on said 17th day of August, 1896, executed for their benefit a deed of assignment to Jesse L. Heiskell, Thomas E. Lander, and William T. Walker, as assignees, the last named assignee being a member of the aforesaid firm of William T. Walker & Co. That shortly after the execution of said deed of assignment affiant entered into a written contract with the said William T. Walker, member of the firm of William T. Walker & Co., as aforesaid, acting on behalf of said firm and with its authority, whereby it was agreed that affiant should convey to the said firm lot 80, in square 190, subject to a trust of $1,800, in consideration for which conveyance the said firm was to cancel and release to affiant the aforesaid

indebtedness and also pay him the sum of $400 in cash. That thereafter, the said firm wishing to recede from the said contract, the following agreement was substituted between them. In consideration of affiant's releasing the said firm from their obligation to take said lot and perform the other conditions of the aforesaid contract the said firm, acting through its duly-authorized representative, the said William T. Walker, agreed to credit on the indebtedness due the said firm from affiant an amount equal to the amount that should subsequently be allowed to the said William T. Walker as commission as assignee in the aforesaid assignment. That the said commission not being ascertainable at that time it was understood that affiant should execute his note as a memorandum of the amount of his original indebtedness and interest due up to that time, which amounted to $840, with the collateral understanding and condition that when the amount due the said William T. Walker should be ascertainable it should be credited upon said memorandum and the said paper should then be considered a promissory note in favor of the said firm for the balance. That the said firm of William T. Walker & Co., before the execution of said note having been incorporated as the W. T. Walker Company, affiant was requested by the said William T. Walker, who was the treasurer and the lawfully authorized agent of the said corporation, to make said note as a matter of convenience to the said corporation, the successor, as aforesaid, of William T. Walker & Co., which was done by affiant, subject to the aforesaid understanding and conditions; that the commission reserved to the said assignees in the said deed of assignment was 7½ per cent upon the amounts received by them from the sale of the property conveyed by the said deed, and the amounts allowed them by the auditor of this court in equity cause No. 23,417, being a suit to administer said trust, was $1,238.97; that one-third of this amount, or the sum of $412.99, is the amount

of commission reserved to the said Walker as assignee, and that this amount, pursuant to the terms of the said agreement, should be credited on account of the said note, but which the said plaintiff has not done.

FRANK H. KNIGHT.

ARGUMENT.

I.

It is to be observed that prior to the date of the execution of the note sued on, the defendant and the predecessor of the plaintiff corporation had entered into a contract in writing for the settlement of the demand of the latter against the former, which then amounted to $800 with accrued interest. At the time of the execution of the note a new parol agreement was had between them. By this Knight agreed to release Walker from his obligation upon his other contract, and Walker agreed in consideration therefor to reduce his demand against Knight in an amount that could not, at that time, be ascertained.

The amount of the original indebtedness with interest was thereupon computed, aggregating $840, and *as a memorandum of this amount the paper sued on was given.* This paper was to remain a memorandum only until such time as the amount of the agreed deduction could be determined. When that could be done that amount was to be credited on the memorandum, and the paper then was to become a promissory note for the balance. Until this condition precedent resting in parol was performed, the paper was not to become an obligation, *but was to be merely the statement of an agreed fact.*

It is believed that parol evidence of such an understanding is admissible. Oral testimony can not vary a written agreement, but oral evidence can be received to show that

the instrument never in fact became an obligation. If the facts set out in the defendant's affidavit are true the paper sued on never became a promissory note.

This court has said in the case of Donaldson *vs.* Uhlfelder, 21 D. C. Appl. 489:

The proposition—

> "that the execution and delivery of a written instrument in form complete may be made upon the condition that it shall not become binding until some condition precedent resting in parol shall have been performed . . . states a rule of the law of evidence that has been settled in this jurisdiction." Citing Burk *vs.* Dulaney, 153 U. S. 228, and Hartford Fire Insurance Co. *vs.* Wilson, 187 U. S. 467.

See, also Cowen *vs.* Adams, 78 Fed. Rep. 550.

The case of Burns *vs.* Scott, 117 U. S. 582, presents a situation nearly resembling that in the present case. Justice Harlan, in his opinion in the case of Burk *vs.* Dulaney, *supra*, reviews Burns *vs.* Scott in the following terms:

> "It is supposed that Burns *vs.* Scott is particularly in point for the appellees. That was an action by the *indorsee* of a negotiable note against the maker. The defendant in that case offered to prove that the note was not intended by him or by the payee as a promissory note, but was given to and was received by the payee as a mere memorandum of the estimated value of the payee's interest in certain railroad bonds placed in the hands of the maker, and which were to be accounted for in the settlement of certain partnership affairs in which the maker and payee were interested, and that upon such settlement it would appear that the payee had received prior to the giving of the note more than his proper share of the partnership assets and therefore was not entitled to claim anything in virtue of such memorandum. This court held the evidence inadmissible upon the ground that by an alleged contemporaneous verbal agreement it varied and contradicted the written contract of the parties.
>
> "*If that action had been brought by the original*

> *payee against the maker, and if the evidence above referred to had been excluded, a different question would have been presented; but, as we have seen, the issue in Burns vs. Scott was between the indorsee of a negotiable note and the maker.* The rule is settled that a negotiable instrument *in the hands of an innocent holder for value* can not be contradicted to his prejudice by evidence of an oral agreement or understanding between the original parties variant from the terms of their written contract."

In the case of Burk *vs.* Dulaney, *supra*, a promissory note absolute on its face was given by Burk to Dulaney in payment for an interest in certain mines then owned by the latter. Parol testimony was admitted to show that it was the understanding of the parties that the note was only to become binding as an obligation in the event the maker after an inspection of the mining property elected to take the interest so sold.

Justice Harlan in that case says:

> "The exclusion of parol evidence of such an agreement could be justified only upon the ground that the mere possession of a written instrument, in form a promissory note, by the person named in it as payee is conclusive of his right to hold it as the absolute obligation of the maker. While such possession is undoubtedly *prima facie*, indeed, should be deemed strong evidence that the instrument came to the hands of the payee as an obligation of the maker, enforcible according to its legal import, it is open to the latter to prove the circumstances under which possession was acquired and to show that there never was any complete final delivery of the writing *as the promissory note of the maker payable at all events and according to its terms.*" In support of which numerous authorities are cited and reviewed.

In the case of the Denver Brewing Co. *vs.* Barets, 9 Colo. Appl. 341, the facts are as follows:

Barets wished to purchase a saloon and license for $1,000.

He asked the Brewing Company to advance the $1,000 and take his notes secured on the saloon property in payment, which the Brewing Company agreed to do. The company gave him the $1,000 and asked him for a memorandum showing the receipt of the money. Thereupon the promissory note (the one sued on) was drawn up and signed by Barets and left with the Brewing Company, which agreed to return the note upon receipt of the note and chattel mortgage agreed to be given. Barets paid the $1,000 for the saloon and then sold it to one Rinderman, who gave his own note secured by chattel trust to the Brewing Company. The business proved a failure, the mortgage was foreclosed, and the proceeds applied *pro tanto* to the payment of the Barets note. The action was on the note for the balance.

The court, after referring to the rule respecting the inadmissibility of parol evidence to alter written instruments, says:

> "The general rule is not regarded as at all infringed by proof of a contemporaneous parol agreement, providing this proof be accompanied by satisfactory evidence that the written instrument was either never delivered, or delivered on a condition which had not been performed, or delivered under circumstances which show that the paper, if it be of a commercial character, *was never intended to be the promissory note of the party who executed it.*" . . .
>
> "Possession of a promissory note is undoubtedly strong *prima facie* evidence that the instrument came into the hands of the holder as the promissory note of the maker, and when the testimony is equally balanced and the matter is left at all in doubt, the instrument and its possession will be regarded by the court or jury as a controlling circumstance. It, however, has not been regarded as conclusive and the maker has been permitted to show it was never intended it should be his note. Barets might, therefore, prove it was not his note and that the agreement was not to return the $1,000 according to the terms of the promise, but it was to stand simply as a memo-

> randum which would protect the Brewing Co., and insure the performance of the contract. . . . Parol evidence of this description does not vary or contradict the term of the agreement. It merely goes to the proposition that *the note was never executed or delivered as a promise to pay money, but was delivered as a memorandum of* the engagement of the parties, to become effective only on the contingency which may or may not have happened, according to the proof."

The affidavit in question in the present case says the writing sued on was never delivered as a promissory note or as a present obligation; that it was delivered only as a memorandum of a *prior indebtedness, which then, in virtue of the agreement of the parties, no longer existed.* That agreement completely extinguished the old debt and provided a formula only for the ascertainment of the new one, which formula could not then be applied for the lack of data. The writing was by mutual agreement to remain a memorandum only of something that had been determined, until the happening of a certain event, i. e., the ascertainment of the assignee's commission of Walker. Upon the happening of this event the amount so ascertained was to be credited upon the *prior indebtedness* agreed in the memorandum, and the instrument should then, and not before, be considered a promissory note for the balance. Before the happening of this event there was no liability at all upon the part of the defendant, because there was no way to ascertain what, if anything, was due from him, and the commission to be credited might have exceeded the amount of the original indebtedness. Upon the happening of the event, the writing became an obligation for the first time, because then, for the first time, it could be determined what sum, if any, was due from the defendant.

The defendant *does not seek to contradict the terms of the*

memorandum. He admits his prior indebtedness to be what the writing says it is. But he says that the writing is but part of the entire agreement between him and the plaintiff, and that he is entitled to have the whole agreement considered.

> "Where parties make an agreement partly in writing and partly by parol, and do not profess to reduce the entire contract to writing, but only a certain part thereof, it is competent to show by parol evidence the entire contract."
>
> Harman *vs.* Harman, 70 Fed. Rep. 894.

II.

In the argument below certain improbabilities in the affidavit of defense were suggested. It was urged that if the defendant had assigned his property for the benefit of his creditors before making his contract with Walker to convey the lot, it was not explained how he then had a lot to convey. It is needless seriously to discuss such objections. The statement of those facts is only prefatory to what comes after, and forming no part of the issue, should not be dwelt upon in detail. They are explicable upon an obvious hypothesis, and upon a motion for judgment must be regarded as true. If the statement is not inherently false it is no argument to advance conjectures and speculative theories, dealing with conditions that only inferentially exist. The affidavit asserts the existence of these facts, and the affidavit, as far as this motion is concerned, is conclusively held to be true.

III.

The defense set up in the defendant's affidavit can be offered under the general issue. In Brown *vs.* Spofford, 95

U. S. 474, the question of the admissibility of such parol testimony by the defendant in a suit upon a promissory note was involved. The court in stating the case says:

> "Service was made; and the defendants appeared and pleaded the general issue, and two special pleas which are fully set forth in the record.
>
> "Special pleas in such a case are unnecessary, as every such defense, when the action is assumpsit upon promissory notes, is admissible under the general issue."

HAYDEN JOHNSON,

For Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1390.

FRANK H. KNIGHT, APPELLANT,

vs.

W. T. WALKER BRICK COMPANY, A CORPORATION, APPELLEE.

BRIEF FOR APPELLEE.

W. H. SHOLES,
BATES WARREN,
Attorneys for Appellee.

THE LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1390.

FRANK H. KNIGHT, APPELLANT,

vs.

W. T. WALKER BRICK COMPANY, A CORPORATION, APPELLEE.

This is an appeal from a judgment of the Supreme Court of the District of Columbia, entered against the appellant for the want of a sufficient affidavit of defense under the 73d rule of that court, on a suit upon a promissory note against the appellant.

Statement of Case.

The appellee, the W. T. Walker Brick Company, a corporation, on the 23d day of April, 1903, sued the appellant Frank H. Knight on the latter's note for $840, dated December 13, 1902, and payable three months after date, to the order of the said W. T. Walker Brick Company, with interest at 6 per cent.

Accompanying the declaration was the usual affidavit on the part of the plaintiff, which is set out at page 3 of the record.

The defendant filed two pleas, as follows:

First. He did not promise as alleged.

Second. He is not indebted as alleged.

These pleas were accompanied by an affidavit, which was subsequently amended, and is set out at pages 5 and 6 of the record.

By these affidavits the appellant, while admitting the execution of the note, seeks by way of defense to set up the following circumstances: On the 17th day of August, 1896, the appellant being indebted to various persons, among others the firm of W. T. Walker & Co., the predecessors of the appellee corporation, whose claim against the appellant at that time amounted to $800, made an assignment for the benefit of his creditors to Jesse L. Heiskell, Thomas E. Lander, and William T. Walker, the latter one of the members of the said firm of W. T. Walker & Co.; that shortly after the execution of the said assignment, the said William T. Walker, acting for the firm, contracted in writing with the appellant to convey to the firm of W. T. Walker & Co. lot 80, in square 190, subject to the trust of $1,800, in consideration of which the said firm was to cancel the said indebtedness of $800 and pay the appellant the sum of $400 in cash; that subsequently the said firm receded from the said contract, and in consideration of the appellants releasing them the said firm, acting through the said W. T. Walker, agreed to credit on the indebtedness due the said firm from appellant an amount equal to the amount that should subsequently be allowed to the said W. T. Walker as commission as assignee in the said assignment.

> "That said commission not being ascertainable at that time it was understood that affiant (appellant) should execute his note as a memorandum of the amount of his original indebtedness and interest due up to that time, which amounted to $840, with the collateral understanding and condition that when the amount due the said W. T. Walker should be ascertainable it should be credited upon said memorandum and the said paper should then be considered a promissory note in favor of the said firm for the balance."

That before the execution of the said note the said firm was incorporated and appellant was requested by the said William T. Walker, the treasurer and agent of the said corporation, to make said note as matter of convenience to the said corporation as successor of the said firm, which was accordingly done by the appellant. That a commission of 7½ per cent was reserved as commissions in the said assignment, and the amount allowed the assignees by the auditor of the court in equity cause No. 23,417, being a suit to administer said trust, was $1,238.97; that William T. Walker's portion is $412.99, and that this amount should be credited on the said note.

ARGUMENT.

I.

There is but one question of law involved in this appeal and that is whether the maker of a promissory note, absolute and unconditional on its face, may, when sued by the payee, introduce evidence to show that the note was intended as a memorandum of the amount of his indebtedness, to become a promissory note for a different amount in favor of the payee when an uncertain sum, which was to be subsequently ascertained, should be credited upon said memorandum.

The elementary rule of law excluding such evidence is stated by the Supreme Court of the United States in the case of Burns *vs.* Scott, 117 U. S. 582, in the following language:

> "Its purpose was to vary and contradict by an alleged contemporaneous verbal agreement the contract which the parties have reduced to writing. It was offered to show that a promissory note in the usual form was not intended by the parties to be a promissory note, but was a mere memorandum, by

> which the maker promised nothing, which gave no rights to the payee, and was to all intents and purposes vain, futile, and of no force or effect whatever. It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose."

The following cases from the State Reports are believed to meet and dispose of the contention raised by the appellant:

Smith's Administrator *vs.* Thomas, 29 Mo. 307:

This was a suit on a promissory note in which defendant sought to show that upon the happening of a certain contingency he was to pay less than the face of the note. The court said:

> "The question is . . . whether . . . he may by proof of a verbal understanding show that a contingency or condition not incorporated into the writing has happened, and in consequence thereof the debt is only half of what it purports to be by the due bill. I am unable to see anything in the transaction that takes the case out of the operation of the general rule against admitting parol evidence to add to, vary, or contradict a written instrument. This contract is sought to be controlled by an oral agreement, made concurrently with it, engrafting upon it a stipulation by which the absolute terms shall be conditional ones."

St. Louis Ins. Co. *vs.* Homer, 9 Met. 39:

This was a suit on a promissory note in which the defense was attempted to be made that at the time the note was executed and delivered it was agreed that whatever sum, if any, there should be found to be due to the makers under a policy of insurance held by them against the company should be set off and applied in and toward satisfaction of the said note. The court said:

> "The note is brief and complete in itself, and is an absolute contract for the payment of a certain sum

of money. This contract the defendant would control by evidence of a verbal agreement, made concurrently with the written contract, affecting the nature of the terms, engrafting upon it a new stipulation by which the parties agree that this absolute promise shall be in truth a conditional one; and, in lieu of the promise to pay the sum stipulated in the note, the defendant proposes to show that any sum which might be found justly due on account of a claim which the makers of the note had against the plaintiff upon a certain policy of insurance given by the plaintiffs should be deducted therefrom and applied in or toward satisfaction of said note. The general principle that oral testimony is admissible to contradict, vary, or explain a written contract is too familiar to require the citation of authorities."

Perry *vs.* Bieglow, 128 Mass. 129:

"The evidence which he (defendant) sought to introduce was for the purpose of showing that this written contract was not the real contract between the parties; that the note was merely a memorandum; and that certain certificates of stock described in the note as collateral security should operate as payment of the note at its maturity, if it was not previously paid. This evidence could not be received without doing violence to the rule that oral evidence can not be admitted to alter a written contract, or to annex to it a condition or defeasance not appearing in the contract itself."

Dayhuff *vs.* Dayhuff's Administrator, 27 Ind. 158:

This was a suit by an administrator d. b. n. against the appellant on his promissory note to a former administrator. The maker of the note contended that the decedent was indebted to him, and that at the time he executed the note in suit to the former administrator he agreed that the amount of the defendant's indebtedness to the estate should be credited upon the note as a set-off. The court held that as the note was executed without any condition or reservation

therein as to the right to set off, the defendant, maker of the note, must be deemed to have waived the promise of the former administrator in respect thereto.

Walters *vs.* Armstrong, 5 Minn. 448:

The syllabus of this case is as follows:

> "A parol agreement, made at the same time with the execution of a promissory note, that a certain sum should be endorsed upon it as paid of that date, is inadmissible."

Atherton *vs.* Dearmond, 33 Iowa, 353.

II.

Were it not that the appellant believes that his affidavit comes within the rule laid down by the United States Supreme Court in the case of Burke *vs.* Dulany, 153 U. S. 228, upon which case he principally relies, it would be a waste of time to cite further authorities.

Since the decision in the case of Burke *vs.* Dulany it has become a favorite method of defense in suits upon promissory notes to meet the plaintiff's affidavit under the 73d rule of the Supreme Court of the District of Columbia by a counter affidavit alleging that such note was not delivered to or received by the payee as a promissory note of the maker binding upon him as a present obligation, but was delivered to become an obligation of that character, enforceable according to its terms, only upon the happening of some future contingency.

Evidence of such conditional delivery, or an affidavit setting out the terms of a condition in accordance with that decision, would of course be admissible, leaving to the jury the question of the truth of such evidence. In the present case the appellant has very adroitly attempted to frame an affidavit that would fit into that decision, but we respectfully submit that he falls far enough short to readily warrant the exclusion of the parol testimony proposed to be offered, as

it tends to contradict the note or vary its terms and does not make the obligation either a nullity or enforceable in its entirety.

In the case at bar, as made out by the defendant's affidavit, it is contended that the note or memorandum was delivered to become a promissory note binding upon the maker for a *different amount* when, as he alleges, a certain sum was credited thereon; and therein is the distinction between the present case and Burke *vs.* Dulany.

In the latter case the court said:

> " . . . The evidence offered by the appellant and excluded by the court did not in any true sense *contradict the terms* of the writing in suit, *nor vary their legal import*, but tended to show that the written instrument was never, in fact, delivered as a present contract, unconditionally binding upon the obligor *according to its terms* from the time of such delivery, but was left in the hands of Dulany to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question; . . . evidence of such an oral agreement would show that the *contingency never happened, and would not be in contradiction of the writing.* . . . While such possession (of the note) is undoubtedly prima facie, indeed should be deemed strong evidence that the instrument came to the hands of the payee as an obligation of the maker, enforceable according to its legal import, it is open to the latter to prove the circumstances upon which possession was acquired, and to show that there never was any complete final delivery of the writing *as the promissory note of the maker, payable at all events and according to its terms.*"

In the case at bar the appellant admits that the note was to become, and did in fact become, his note in favor of the payee, but for a different amount, or with a credit thereon, though the affiant does not declare whether William T. Walker or the appellee ever received this alleged commission, or the date when this alleged credit was allowed.

III.

In the case of Burke *vs.* Dulany the appellant therein urged upon the court its decision in Burns *vs.* Scott, supra, as controlling in that case. In differentiating the case of Burns *vs.* Scott from the case then before the court, the following expression is used, from which the appellant in this appeal appears to derive great comfort:

> "If that action had been brought by the original payee against the maker, and if the evidence above referred to had been excluded, a different question would have been presented."

That might readily be, as, by reference to the decision in Burns *vs.* Scott, the testimony offered and excluded was as follows:

> " With the understanding that the same (the note) was *not to be sued on,* but was to be deemed to be a mere memorandum of the amount that should be estimated as the share of the said Winston on account of said bonds in the settlement among said partners; that the defendant executed the said note accordingly, as trustee of the partnership, and *not as his individual note.*"

In Burke *vs.* Dulany the note was to become operative in its entirety as expressed upon its face, or it was to be totally inoperative.

In Burns *vs.* Scott the note was not to be sued on and was not delivered to the payee as the promissory note of the plaintiff, nor was there any contingency that could happen that would ever make the note operative as against the maker. This evidence might well have been admitted in a suit by the payee against the maker.

The case at bar presents an entirely different proposition. Here the note is to be operative upon the happening of a certain contingency but *not according to its terms.*

The line of demarkation between the two classes of cases is well defined and easily distinguishable, and was pointed out by this court in the case of Randle *vs.* Davis Coal Co., 15 App. D. C., 357, where the indorser of a promissory note undertook to set up certain conditions agreed to by the payee of the note as affecting the indorser's liability thereon. The court said:

> "In the case of a conditional delivery of a note or other instrument parol evidence may be admitted to prove the conditional delivery and non-fulfillment of the condition in order to *avoid the effect of the instrument.* This, however, is *not to show any modification, contradiction, or alteration of the written agreement, but that it never became operative,* and that its obligation never commenced."

See Gorrell *vs.* Home Life Ins. Co., 63 Fed. Rep. 371.

IV.

Assuming, as contended by appellant, that the writing in question became the promissory note of the appellant for the difference between its face and the commission allowed W. T. Walker, when that commission was ascertainable, how could such a note be described in a declaration for suit?

The commission, according to appellant, was $412.99, leaving a balance of $427.01 from the face of the note. But the note could not be described in the declaration as a note, dated December 13, 1902, for $427.01, payable three months after date, etc., as that would be a contradiction of the face of the paper sued on and a fatal variance.

Suit could only be brought on the instrument when it became a promissory note according to its tenor and for the amount expressed on its face, leaving to the maker the

right by appropriate plea to claim any set-off he might be entitled to, which the appellant has not done.

Code D. C., secs. 1563–64.

"By the weight of authority matter which it is intended to rely upon as a set-off must be pleaded as such, and not merely as a ~~set-off~~ "defense"

19 Ency. of Pl. & Pr. 742.

V.

As affecting the credibility of defendant's affidavit, which should be considered by the court in passing upon the sufficiency thereof, it is well to point out some of its inconsistencies.

a. The right to the *alleged credit* grew out of the defendant's release of the plaintiff's contract to buy of the defendant lot 80, in square 190, subject to an existing deed of trust, for which plaintiff was to pay defendant $400 in cash and release defendant from his existing indebtedness to the plaintiff, amounting to $800.

The defendant's affidavit says that by reason of unsuccessful business ventures he made an assignment for the benefit of his creditors, and *shortly after the execution of said deed of assignment* he contracted with plaintiff to convey lot 80, in square 190, to them upon certain conditions. But on his own showing the title to his property had passed to his assignees for the benefit of all his creditors. He no longer retained control over it nor could he pass title thereto or make a binding contract in respect thereof.

b. Again, the defendant says that at the time he executed his promissory note as a memorandum, on December 13, 1902, it represented his original indebtedness of $800, with interest to that date amounting to $40, making $840 in all.

But his original indebtedness antedated his assignment of August 17, 1896, and interest on $800 from that time to

the date of the note, December 13, 1902, would be over $290. The $40 interest allowed would be for a period of less than one year. The affidavit is silent as to whether defendant paid the interest up to 1901. If he did it would be totally inconsistent with his alleged claim, and if he did not, why was $40 only included as the amount of the interest?

The whole statement is so improbable, the absence of dates and other specifications is so apparent, that the verity of his alleged defense may well be doubted.

For the reasons assigned we respectfully submit that the judgment should be affirmed.

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